

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

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IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 5364-s76M BY GEORGE AND EVELYN FINLEY  
**FILMED**  
APR 9 1980  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER  
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A hearing on this Application for Beneficial Water Use Permit was held on June 16, 1976, at Superior, Montana, before Allen Chronister, hearing examiner for the Department. The Applicants, George and Evelyn Finley, and the Objectors, Charles Antos and John Callen, attended the hearing and presented testimony. James Rehbein from the Department's field office in Kalispell was present at the hearing and explained for the record the contents of the Department's file on this Application.

A Proposed Order (Proposal for Decision) dated July 9, 1976, was issued by the hearing examiner, Allen B. Chronister.

The Proposed Order Notice as issued provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral argument before the Administrator.

On July 27, 1976, the Department received from John L. Callen, Sr., an exception letter dated July 26, 1976, filed in opposition to the Proposed Order. The Department by letter of July 28, 1976, informed Mr. Callen of his opportunity to file a brief supporting his exception within fifteen days after receipt of the Department's letter. On August 6, 1976, the Department received Mr. Callen's brief supporting his exception.

The Department by letter of August 10, 1976, to the Applicants, informed them of their opportunity to file a reply brief within fifteen days after receipt of the Department's letter. On August 20, 1976, the Department received the Applicants' reply brief, dated August 16, 1976.

On August 17, 1976, the Department received a letter dated August 16, 1976, from Charles J. Antos supporting Mr. Callen's exception and position in this matter.

The Department by letters of August 23 to Mr. and Mrs. George Finley and Mr. Callen requested each to inform the Department if in fact they wished to request an oral argument hearing. Mr. Finley by letter of August 30, 1976, did

**CASE # 5364**

not request an oral argument hearing; however, he would attend if Mr. Callen and Mr. Antos requested one. The Department received a letter dated September 1, 1976, from Mr. Callen and he did not request an oral argument hearing. Mr. Callen stated Mr. Antos was discussing the matter with his attorney, and if Mr. Antos requested an oral argument hearing he would be present.

On September 16, 1976, the Department received a letter and a Petition for Reopening from Vernon Hoven, counsel for Mr. Antos. On September 20, 1976, the Department received a letter from Mr. Hoven, which stated in part as follows: "The purpose of this letter is to request time in which to submit written argument on behalf of Mr. Antos. Prior to this time we have requested a reopening; the reopening would be unnecessary in the event you would grant us time in which to make written argument."

The Department by letter of September 22, 1976, to Mr. Hoven, advised him that the matter had been discussed with the Department legal staff and it was decided that he could file a written argument or brief on behalf of Mr. Antos, since Mr. Antos' letter of August 16, 1976, was considered as a supporting document to Mr. Callen's exception of July 26, 1976. Mr. Hoven was given ten days to file his written argument or brief with the Department.

The Applicant by letter of September 29, 1976, made his feeling further known in this matter, and the Department by letter of October 6 acknowledged receipt of his letter and advised him that the Department was still waiting for Mr. Hoven's written argument or brief.

On October 7, 1976, the Department received Mr. Hoven's "Exception to Proposal for Decision" and "Argument in Support of Exceptions to Proposed Decision," both dated October 6, 1976, filed on behalf of his client, Mr. Antos.

On October 8, 1976, the Department received a letter from Christopher B. Swartley requesting that he be entered as the attorney of record in this matter on behalf of the Applicants. Mr. Swartley also requested copies of all relevant documents in this case, in order to familiarize himself with the application. The Department by letter of October 14, 1976, acknowledged Mr. Swartley's letter and enclosed twenty-eight separate enclosures for his information.

The Department by letter of October 14 to Mr. Hoven requested his decision in writing indicating if in fact they wished to pursue this matter to an oral argument hearing.

By letter of October 21, 1976, Mr. Hoven responded by stating in part, "Insofar as this office is concerned representing the Objector, Mr. Antos, we feel that the administrator has sufficient facts at hand together with the written exceptions

and arguments to make its decision. However, in the event that the office of Datsopoulos and McDonald desires to have oral argument on the matter, we will not resist the same." The Department by letter of October 25 acknowledged receipt of Mr. Hoven's letter and informed him the Department was waiting for a reply brief from Mr. Swartley, counsel for the Applicant.

On October 26, 1976, the Department received a letter dated October 25 from Mr. Swartley, which stated, "In response to your inquiry concerning oral argument and the letter of Mr. Hoven of October 19, 1976, we would agree that oral argument is unnecessary, considering the thorough documentation of the controversy. We will, therefore, waive argument unless requested by any other party. We will have a reply brief submitted by October 29." The Department by letter of October 27, 1976, acknowledged receipt of Mr. Swartley's letter and advised him that since oral argument had not been requested by either party in this matter, after a copy of his reply brief was received and a copy sent to Mr. Hoven the Department would proceed to forward this matter to the administrator of the Water Resources Division for preparation and issuance of a Final Order, based on the entire application record, taking under full consideration the exceptions and briefs filed by all parties to this matter.

On October 28, 1976, the Department received Mr. Swartley's reply brief dated October 27, 1976, and filed on behalf of the Applicants.

By letter of November 1, 1976, the Department acknowledged receipt of Mr. Swartley's reply brief. A copy of said reply brief was sent to Mr. Hoven and all parties were informed that the application file would be forwarded to the Water Resources Division administrator for preparation and issuance of a Final Order.

Since none of the parties in this matter specifically requested an oral argument on the objections, exceptions, and briefs before the administrator of the Water Resources Division, the administrator hereby makes the following Final Order, based on the Proposed Order of July 9, 1976, the objections, exceptions, briefs, and all other pertinent information of record.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on July 9, 1976, by the hearing examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby modified to read as follows:

FINAL ORDER

1. The Applicants' Provisional Permit is hereby conditionally granted for Application 5364-s76M to appropriate, subject to the conditions imposed below,

1 cubic foot of water per second, not to exceed 45 acre-feet per year, from West Twin Creek, in Mineral County, Montana, to be diverted by ditch in the SW $\frac{1}{4}$  NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 13, Township 19 North, Range 30 West, to flood irrigate a total of 20 acres from May 1 to October 15, inclusive, of each year. The water is also to be used to water domestic stock as applied for, including 5 horses and 3 cattle.

2. The permit shall be subject to the following conditions:

a. The period of use shall be from May 1 to October 15, inclusive, of each year, except during those periods when the flow of West Twin Creek at the Mountain Home Nurseries diversion point on West Twin Creek drops to or below the 78 miner's inches of water to which Mountain Home Nurseries claims prior right. The Applicant should take notice that he will accordingly probably not be able to divert water during August and September of most years. This condition applies to the volume of water available for diversion at the Nurseries' headgate diversion point on West Twin Creek and not to the volume of water passing the Applicants' point of diversion on West Twin Creek.

b. It shall be the responsibility of the Objector, Charles Antos, to notify the Applicants when, in fact, the water level in West Twin Creek drops to or below 78 miner's inches at his headgate diversion point from West Twin Creek. It shall be the responsibility of the Objector to accurately measure the water at his point of diversion. It shall be the responsibility of the Applicants to cease diverting water pursuant to this permit when the water level in West Twin Creek drops to or below 78 miner's inches at the Nurseries' headgate diversion point, whether or not he is notified by Mr. Antos.

It shall be the responsibility of each of the parties to cooperate with each other and not to abuse his water rights at the expense of the other, since these conditions must be essentially self-policing.

c. The Applicants shall prepare and furnish to the Department for approval a description of their diversion structure prior to commencing construction thereon.

d. The Provisional Permit shall be subject to all prior water rights in the source of supply, and subject to any final determination of prior existing water rights as provided by Montana law.

e. The issuing of the Provisional Permit by the Department in no way reduces the Permittees' liability for damage caused by the

Permittees' exercise of their Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by Permittees' exercise of their Provisional Permit.

f. At the discretion of the Department, the Permittees shall, with adequate notice given, install and maintain an adequate measuring device so as to enable the Permittees to keep a record of all quantities of water actually diverted from West Twin Creek, and as well to enable the Permittees to keep a record of the periods of diversion. Such records shall be presented to the Department by the Permittees upon demand by the Department.

3. The Provisional Permit is granted subject to the right of the Department to revoke the permit in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-898, R.C.M. 1947.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation where practical, and keep a log of records of water used for proof of their water rights.

Done this 13<sup>th</sup> day of July, 1977



Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

**CASE # 5364**

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE ) PROPOSAL FOR DECISION  
PERMIT NO. 5364-s76M BY )  
GEORGE AND EVELYN FINLEY )  
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A hearing on this Application for Beneficial Water Use Permit was held on June 16, 1976, at Superior, Montana, before Allen Chronister, Hearing Examiner for the Department. The Applicants George and Evelyn Finley and the Objectors Charles Antos and John Callen attended the hearing and presented testimony. James Rehbein from the Department's field office in Kalispell was present at the hearing and explained for the record the contents of the Department's file on this Application.

FINDINGS OF FACT

1. The Applicants have applied for 1 cubic foot of water per second (40 miner's inches), not to exceed 45 acre-feet per annum, from West Twin Creek in Mineral County, Montana. The water is to be used to irrigate 20 acres of grain or hay from May 1 to October 15 of each year. A gravity-flow flood-irrigation system is contemplated, although no structures have yet been designed. The Applicants currently use no water from West Twin Creek.

2. The Objector Charles Antos is the operator of and is purchasing Mountain Home Nurseries, a commercial evergreen

**CASE # 5364**

farm, located about 1-1/4 mile downstream from the Applicants' property. Mr. Antos sprinkles 55 to 58 acres of evergreens with an 1889, 78-miner's-inch right from West Twin Creek and a 28-miner's-inch 1901 right from East Twin Creek. Farmed evergreens require periodic water application throughout the day, and timing of the water application is crucial.

3. The Objector John Callen is the former owner of Mountain Home Nurseries, and is presently selling the farm to Mr. Antos under contract for deed.

4. The Nursery has experienced an annual shortage of water during August and September, at least since it has been operated by Mr. Callen and then Mr. Antos. During this latter part of the summer, the Nursery has on occasion taken all of the water from the East and West Forks of Twin Creek, and even then has had insufficient water to fill its 78- and 28-miner's-inch rights. A measuring device on East Fork of Twin Creek has read as low as 9 miner's inches during the later summer.

5. West Fork of Twin Creek is a perennial stream. The nature of its bed is such, however, that even though there is a large quantity of water flowing through the Applicants' property, a substantial stream loss occurs by the time it reaches the Nursery. This is apparently due to gravel beds in the stream bank which absorb the water.

6. Mr. Antos has no objection to Mr. Finley's pumping water during the spring and summer when there is water surplus to the Nursery's rights.

### CONCLUSIONS OF LAW

1. During the spring and early summer of most years there is unappropriated water in West Twin Creek.
2. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from West Twin Creek.
3. Mountain Home Nurseries appears to have valid existing water rights in West Twin Creek.
4. The prior water rights of the Objector must be protected.
5. Prior water rights can be protected by conditioning the permit so that the Applicant ceases pumping water when the level of water in West Twin Creek drops to or below 78 miners' inches measured at the Mountain Home Nursery's point of diversion.
6. The proposed means of diversion are unknown, and the permit should be conditioned upon submission of a plan for construction of the diversion works.
7. The proposed use of water is a beneficial use.
8. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been granted or for which water has been reserved.
9. The application should be granted subject to the conditions in the Proposed Order.
10. Nothing decided herein has a bearing upon the status of water rights claimed by the Applicant other than those applied for, nor does anything herein have a bearing upon the claimed rights of any other party except in relation



to those rights herein applied for, to the extent necessary to reach a conclusion herein.

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of one cubic foot of water per second, not to exceed 45 acre-feet per year, from West Twin Creek in Mineral County, Montana. The water is to be diverted in the SW1/4 NW1/4 SE1/4, Section 13, Township 19 North, Range 30 West, Mineral County, Montana, to flood irrigate 20 acres of grain or hay or both from May 1 to October 15, of each year. The water is also to be used to water domestic stock as applied for, including 5 horses and 3 cattle.

2. The permit shall be subject to the following conditions:

a. The period of use shall be from May 1 to October 15 of each year, except during those periods when the flow of West Twin Creek at Mountain Home Nurseries drops to or below the 78 miner's inches of water to which Mountain Home Nurseries claims prior right. The Applicant should take notice that he will accordingly probably not be able to divert water during August and September of most years. This condition applies to the volume of water available for diversion at the Nursery, and not to the volume of water passing the Applicant's point of diversion.

b. It shall be the responsibility of the Objector Charles Antos to notify the Applicants when, in fact, the water level in West Twin Creek drops to or below 78 miner's inches. It shall be the responsibility of the Objector to accurately measure the water at its point of diversion. It shall be the responsibility of the Applicants to cease diverting water pursuant to this permit when the water level in West Twin Creek drops to or below 78 miner's inches at the Nursery's point of diversion, whether or not he is notified by Mr. Antos. It shall be the responsibility of each of the parties to cooperate with each other and not to abuse his water rights at the expense of the other, since these conditions must be essentially self-policing.

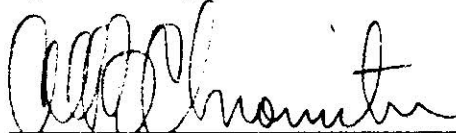
c. The Applicants shall prepare and furnish to the Department for approval a description of their diversion structure prior to commencing construction thereon.

d. The permit shall be subject to all prior water rights.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 9th day of July, 1976.



ALLEN B. CHRONISTER  
HEARING EXAMINER

**CASE #5364**